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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1962.

No. 320.

E. J. LAVINO AND COMPANY,
Petitioner,

v.

UNITED STATES LINES COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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UNITED STATES LINES COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Respondent, United States Lines Company, opposes the petition of E. J. Lavino and Company for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

QUESTIONS PRESENTED.

1. Where it is agreed between a shipowner and a cargo owner that the latter shall be responsible for accomplishing the discharge of its own cargo and all matters incidental thereto, can the cargo owner avoid its duty to indemnify the shipowner for losses sustained by improper performance of that obligation on the ground that it hired a contrator to do the work?

2. May not the cargo owner's duty to indemnify the shipowner be implied, as distinguished from expressed in the written terms of the contract?

STATEMENT OF THE CASE.

Several matters contained in petitioner's statement of the case require either correction or clarification.

For a comprehensive and accurate statement of the facts immediately underlying this petition, devoid of irrelevancies, attention is respectfully invited to the Opinion of the Trial Judge (105a), wherein he specifically adopted, with stated modifications, requests for findings of fact submitted by respondent (94a-98a), and requests submitted by petitioner (98a-100a). The Trial Judge also adopted (111a) respondent's requests for conclusions of law (102a-103a) as the conclusions of law of the Court.

Petitioner asserts that this case was tried solely on the bill of lading, citing in detail excerpts from various documents, colloquy, etc., in an attempt to show that respondent's sole reliance was on the written provisions of the bill of lading to which petitioner frequently refers as the "integrated contract".

The fact is that the entire agreement and understanding between petitioner and respondent was not contained in the bill of lading. The evidence—mainly petitioner's own evidence—established and the Trial Judge found that the bill of lading was supplemented by an established practice based upon prior similar transactions, whereby it was understood and agreed that petitioner would arrange for the discharge of its own cargo. It was also understood that the discharge would be performed for petitioner's account by the stevedoring division of Lavino Shipping Company (respondent's finding of fact No. 6; 95a-96a). A substantially similar finding was requested by petitioner and was affirmed (petitioner's finding of fact No. 8; 99a). Therefore it cannot be said that in this instance, the bill of lading was a complete integration of the agreement between the parties. This is contrary to the evidence—including petitioner's own evidence—and contrary to the findings of fact

of the Trial Judge which petitioner does not appear to dispute and, on this record, could not dispute.

Petitioner's suggestion that the Trial Judge initially decided this case on a theory inconsistent with that advanced by respondent was urged upon and rejected by the Court of Appeals. That Court noted that respondent's pretrial memorandum asserted several grounds in support of its indemnity claim, including the very ground upon which recovery was sustained (petition, p. 16). The Court of Appeals also pointed out that this same theory was incorporated in a proposed conclusion of law submitted by respondent and adopted by the Trial Judge (petition, p. 17).

Petitioner states that apart from the word "Lavino" in their corporate titles, there is no connection whatever between petitioner and Lavino Shipping Company; that there is no identity of interest between them and they are insured by different liability insurance companies (petition, p. 9). The relevance of these statements is obscure, but should they be regarded as significant, it should be noted for the sake of accuracy that they are not supported by the record. The most that the record discloses is that petitioner and Lavino Shipping Company are "separate and distinct corporate entities" (petitioner's finding of fact No. 13; 100a; 105a). Any further comment on petitioner's undocumented assertions would involve going outside the record as petitioner has done, and respondent does not propose to do.

Petitioner made no attempt to join Lavino Shipping Company in this litigation in order to assert a claim over against it. Nor, as the Trial Judge observed (115a), has respondent done anything to preclude petitioner from bringing a separate action in indemnity against Lavino Shipping Company.

REASONS WHY THE WRIT SHOULD BE DENIED.

The decision of the Court of Appeals involves nothing which would merit review by this Honorable Court. The several reasons advanced by petitioner will be examined and discussed separately.

The present decision is in no sense in conflict with any decision of this Court. Rather, it is harmonious with the underlying principles of the cases as to which petitioner says a conflict exists.

Of course, *Ryan Stevedoring Co. v. Pan Atlantic Steamship Corp.*, 350 U. S. 124; *Weyerhaeuser Steamship Company v. Nacirema Co.*, 355 U. S. 563; *Crumady v. The J. H. Fisser*, 358 U. S. 423, and *Waterman Co. v. Dugan & McNamara*, 364 U. S. 421, dealt specifically with a stevedore contractor's obligation to indemnify a shipowner, whereas the present case involves a similar obligation on the part of a cargo owner. However, it does not follow that since the *Ryan* line of cases upheld the stevedore contractor's liability, they denied or in any way diluted the liability on the part of a cargo owner. Certainly the mere fact that a stevedore contractor may be liable under a given set of facts does not exculpate everybody else.

While *Ryan* involved the vessel owner-stevedore contractor relationship, it is certainly not crucial to the fundamental issue. True, the interplay of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C., Section 901 *et seq.*, in *Ryan* required extended discussion of that relationship. However, it is perfectly clear that *Ryan* and its successors are fundamentally based upon a principle which goes much deeper than the shipowner-stevedore contractor relationship: where parties agree that, as between themselves, one of them shall be responsible for the accomplishment of an objective, a right of indemnity arises in favor of the party injured by a failure of performance.

In these circumstances it is no defense to the indemnitor that it hired a contractor to discharge its basic respon-

sibility. Absolution by parcelling out work to a contractor is a thoroughly discredited doctrine in the maritime law. For instance, a vessel owner is not relieved of its responsibility to longshoremen in respect of safe appliances by turning over the stevedoring work to a contractor: *Crumady v. The J. H. Fisser*, *supra*, at 358 U. S. 427; *Alaska Steamship Co. v. Petterson*, 347 U. S. 396. Indeed, in the antecedent history of this case respondent's liability to the original plaintiff stemmed from the furnishing and use by the stevedore contractor of a defective appliance; it was no defense to respondent that it had employed a contractor to discharge the duty which it owed original plaintiff. *Rogers v. United States Lines*, 347 U. S. 984.

The important point here is that as between petitioner and respondent, petitioner had undertaken the duty and responsibility to accomplish the unloading of its own cargo. How this duty and responsibility were to be discharged was a matter of choice on petitioner's part. It is immaterial that respondent knew of, or acquiesced in the employment of a contractor. Certainly respondent neither acquiesced in nor assumed the risk of substandard performance by the contractor. Having made its own election, petitioner cannot use it to avoid its own basic responsibility.

Petitioner makes much of the fact that its obligation to indemnify is not expressed in writing in the bill of lading. This contention is completely without merit. In the first place, the entire agreement between the parties was not contained in the bill of lading; it was supplemented by the established practice which, as the Courts below indicated, became a part of the contract itself. Moreover, the argument that the indemnification obligation must be spelled out in a written contract is clearly foreclosed by the *Ryan* line of cases, which hold precisely the contrary.

Petitioner's statement that the decision below "tends to vitiate basic and traditional concepts of the law of contracts in the area of maritime indemnity" (petition, p. 10), is insupportable. Actually, the decision below is in com-

plete accord with the entire body of maritime law on this point which antedated the *Ryan* line of cases.

In *Thompson v. Winslow*, 128 Fed. 73, affirmed 134 Fed. 546 (C. A. 1, 1904), it was held that a cargo owner who had engaged carriage of his goods under a bill of lading was liable to the vessel owner for damage to the vessel caused in the performance of an obligation resting on the cargo owner. In *Thompson*, the bill of lading required the cargo owner "to tow vessel in and out of Back Bay free". The cargo owner hired an independent towing contractor who performed the towage negligently, damaging the vessel. It was held that as between vessel owner and cargo owner, the latter must bear the ultimate burden of the loss. The Court rejected the contention that the cargo owner could defend on the ground that it had hired an independent contractor.

Park Steamship Co. v. Cities Service Oil Co., 188 F. 2d 804 (C. A. 2, 1951), allowed recovery to a shipowner for failure of a voyage charterer to discharge its obligation under its contract with the shipowner to select a "safe place for the vessel's discharge". The charterer failed to select a safe berth, in consequence of which the vessel grounded. The Second Circuit Court of Appeals held that the shipowner was entitled to be indemnified by the charterer notwithstanding that the pilot immediately responsible for the grounding had actually been employed *by the shipowner*. The Court pointed out that under the contract the charterer controlled the manner and place of discharge of its cargo. It had bargained for the privilege of selecting the place and the shipowner surrendered that privilege in return for the charterer's acceptance of the risk of its choice. Having covenanted that it would provide a "safe place", the charterer was responsible for the pilot's conduct since the pilot was performing a service for which the charterer was responsible.

The same reasoning is clearly applicable to the present case. As between petitioner and respondent, the former

was responsible for the discharge of the cargo. This relationship imposed upon petitioner *vis-a-vis* respondent the duty to see that the work was accomplished in a manner so as not to expose respondent to liability to third parties. It is for the breach of that duty that petitioner must indemnify respondent.

That a shipowner is entitled to rely upon his opposite contracting party for safe and proper performance of the latter's undertaking is by no means a new concept. See, for example, *Cities Service Transp. Co. v. Gulf Refining Co.*, 79 F. 2d 521 (C. A. 2, 1935), where the Court held that the contract was itself an express assurance, on which the vessel owner was entitled to rely, that the contracting party would properly perform its duty—in that instance, the selection of a berth where the vessel would remain always afloat. To the same effect is *Kirk v. Arc Steamship Company*, 21 F. R. D. 293 (S. D. N. Y., 1958).

In *DiMeglio v. The Black Condor*, 120 F. Supp. 865 (S. D. N. Y., 1954), it was held that where a shipowner is found liable to an injured person for breach of the duty to provide a safe place to work, and such breach resulted from the faulty performance of the contractual duty of a time charterer or his agents who controlled the loading of the vessel, an implied contract of indemnity arises in favor of the shipowner and against the charterer.

While the precise contract in several of the foregoing authorities was in the form of a charter, that fact is unimportant for present purposes. The description of the contract has not been regarded as of controlling significance. After all, a "charter" is nothing more nor less than a particular form of contract. Gilmore and Black, in their modern treatise, *The Law of Admiralty*, point out that a charter party "is merely a contract, subject in general to all the rules and requirements of contract law" (at p. 172). Clearly the consequences of a contractual undertaking via a charter are no different from those flowing from an agreement for the carriage of goods such as existed in this case;

both transactions are subject to the ordinary rules of contract law.

Therefore the authorities involving charters specifically are equally relevant for present purposes. In allowing indemnity, they do not turn upon the fact that the particular contract was described as a "charter", as distinguished from something else. They rest on the simpler and fundamental proposition that the parties had entered into a contract and undertaken areas of responsibility to each other. The result does not stem from the descriptive label attached to the particular contract. It is sufficient that there *was* an agreement and undertaking between the parties.

In the light of the foregoing authorities (and petitioner cites none to the contrary), petitioner's statement that the decision below "tends to vitiate basic and traditional concepts of the law of contracts in the area of maritime indemnity" is palpably wrong. The decision below is in complete harmony with the existing law.

Petitioner's final contention is that the decision below conflicts with the Opinion of the United States Court of Appeals for the Fourth Circuit in *American Export Lines v. Revel*, 266 F. 2d 82, affirming 162 F. Supp. 279. *Revel* allowed recovery to the shipowner against the cargo owner under analogous circumstances. However, petitioner attempts to distinguish *Revel*, and concludes that if the question presented in this case were raised before the Fourth Circuit, it would go the other way. This is an insupportable statement and petitioner's attempt to distinguish *Revel* is based upon factual inaccuracies.

In *Revel*, the United States, acting through the Military Sea Transport Service, contracted with the shipowner for part of the vessel's cargo space to carry Government cargo. Petitioner states that the Government expressly agreed to "perform" the unloading of its cargo (petition, pp. 12-13). This is not so. The contract provided that the

handling of cargo would "be performed *or arranged for* by the Government" (emphasis supplied; at 162 F. Supp. 286). The Government had agreed to bear the expenses of cargo handling, including stevedoring. This is substantially the same undertaking for which petitioner was responsible in the present case. The Government employed a stevedoring contractor to load its cargo. One of the contractor's employees was injured during the operation and sued the shipowner, which impleaded the Government. It was held that there was an implied contractual agreement between the shipowner and the Government "wherein the United States agreed to *provide* the stevedoring services to such extent as they would be performed 'with reasonable safety' " (emphasis supplied; at 162 F. Supp. 286-287). Since the stevedoring services were not so performed, which failure contributed to the longshoreman's injuries, the shipowner was held entitled to indemnity from the Government.

The shipowner's recovery in *Revel* was held to be consistent with *Ryan* and *Weyerhaeuser*, *supra*. That is, the breach of the Government's own implied warranty arising from its contractual relationship with the shipowner gave rise to the liability.

Perhaps petitioner has completely misunderstood *Revel*. This is evidenced by its further statement, in attempting to distinguish *Revel*, that the "United States M. S. T. S. was probably the world's largest master stevedore . . . " (petition, p. 13). This is not so, and nothing in *Revel* so intimates. Respondent believes that if any assumption is to be indulged, it is the converse. It is more probable that the United States is one of the world's largest *employers of* master stevedores.

Therefore petitioner's attempted distinctions of *Revel* are entirely without merit. Indeed, it would be difficult to conceive of a case closer in point, factually, than *Revel*. The result there reached is the same as that reached in the decision below and its reasoning cannot be faulted.

Petitioner refers to the decision below as a "perversion of the *Ryan* doctrine" (petition, p. 13). This statement defies understanding. As discussed previously, the decision below is in complete harmony with *Ryan;* petitioner either disregards or fails to recognize the fundamental principle underlying the *Ryan* line of cases. Moreover, as demonstrated above, *Ryan* is perfectly consistent with the established body of law governing maritime indemnity which supports recovery here.

In attempting to reverse, or at least severely limit the existing law, petitioner ignores the clear trend to uphold, rather than to restrict, the right of maritime contractual indemnity as evidenced by *Weyerhaeuser, Crumady* and *Waterman, supra.* This same trend is established by numerous Court of Appeals decisions such as *Paliaga v. Luckenbach Steamship Company*, 301 F. 2d 403 (C. A. 2, 1962); *DeGioia v. United States Lines Company*, 304 F. 2d 421 (C. A. 2, 1962); and *Pettus v. Grace Line, Inc.*, — F. 2d —, (C. A. 2; June 27, 1962).

Finally, it should be noted that the result below did not, as petitioner suggests (petition, p. 12, footnote 1), grant relief to a shipowner who was "at least passively negligent and who was in a position to prevent the accident . . .". The record demonstrates that this is not so. The Opinion of the Trial Judge (106a, footnote 3) recites the facts underlying original plaintiff's accident. In a nutshell, the accident was caused by the furnishing and use of an insufficient wire runner installed on respondent's vessel by Lavino Shipping Company. Thus respondent's initial liability was based upon the breach of a judicially declared absolute duty: *Alaska Steamship Company v. Petterson, supra; Rogers v. United States Lines, supra.* In essence, the breach arose from fault of Lavino Shipping Company who, as between petitioner and respondent, was discharging a function and duty resting upon petitioner. Nothing in this record indicates that respondent was negligent in any degree, or was in a position to prevent the accident.

WHEREFORE, respondent prays that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit be denied.

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